

ANALYSIS AND CRITIQUE OF STATE PRE-EMPTION OF MUNICIPAL EXCISE AND INCOME TAXES UNDER OHIO HOME RULE

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The preclusive effect of the pre-emption doctrine in the field of municipal taxation becomes clearly apparent when viewed in relation to the rapid spread of municipal income taxes in Ohio. The first such ordinance was enacted by the city of Toledo in 1946. By the middle of 1957, some twenty-seven municipalities had entered the field; and less than three years later, with the opening of the 1960's, the number had increased to fifty-one, including thirty-nine cities and twelve villages.¹ The apparent popularity of this levy rests primarily upon extremely practical grounds. Unlike excise taxes generally, and although subject to limitations, it is the one form of tax which Ohio municipalities have discovered is least vulnerable to invalidation by the Ohio Supreme Court. The case of *Angell v. City of Toledo*,² marked the turning point in a series of frustrating decisions which, while praiseworthy in certain aspects of tax policy, defeated commendable municipal efforts toward self-reliance. It is the purpose of this article to review the origin and development of the pre-emption doctrine and to re-evaluate it in terms of legal validity and public policy.³

ORIGIN OF THE DOCTRINE

Municipalities in Ohio are not dependent upon legislative authorization as the fountainhead of their taxing powers. Under the home-rule amendment of the Ohio Constitution, adopted in 1912, municipalities were granted authority to exercise all powers of local self-government.⁴ These powers, the supreme court held in *State*

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¹ "Municipal Income Taxes in Ohio," January 25, 1960: Research Report, Ohio Department of Taxation, LG-11, 2-60; 2 CCH "State Tax Reporter" (Ohio), par. 71-102d to 73-662 (1960).

² 153 Ohio St. 179, 91 N.E.2d 250 (1950).

³ For earlier discussions of the problem, see Glander, "The Uniform Municipal Income Tax Act," 18 Ohio St. L.J. 489 (1957); Fordham and Mallison, "Local Income Taxation," 11 Ohio St. L.J. 217 (1950); Glander and Dewey, "Municipal Taxation: A Study of the Pre-emption Doctrine," 9 Ohio St. L.J. 72 (1948).

⁴ "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const., art. XVIII,

ex rel. Zielonka v. Carrel,⁵ necessarily include the powers of taxation. "There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation," said the court, "for without this power local government in cities could not exist for a day."

But this power, as the court also pointed out, is subject "to the staying hand of the general assembly," for the constitution also provides that "laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes."⁶ By what kind of laws? It is here that the *Zielonka* case strikes the note which portends the questionable aspect of the pre-emption doctrine. "It is enough to say," said the court, "that the general assembly has not expressly limited the authority of municipalities to levy an occupational tax, *nor has it impliedly limited such authority by invading the field on its own account.*" This case involved a Cincinnati ordinance which levied an annual occupational tax upon manufacturers of bottles and glassware articles, and osteopathic physicians, such occupations having been chosen for the purpose of instituting a test case. The supreme court upheld the tax, stating in the second paragraph of the syllabus that:

2. Under the grant of power of local self-government provided for in Section 3, Article XVIII of the State Constitution, the City of Cincinnati, as long as the State of Ohio through its general assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes.

In other words, the court held that it is not necessary for the purpose of limiting municipal taxing powers, that the general assembly pass a "thou shalt not" statute; it may as effectively achieve this result by implication, "by invading the field on its own account." It is this doctrine of pre-emption by implication, as distinguished from express interdiction, that has long been both controversial and questionable in respect of municipal taxation in Ohio.

§ 3. See also art. XVIII, § 7, which provides that any municipality may frame and adopt a charter for its government and may, subject to the provisions of section 3, *supra*, exercise thereunder all powers of local self-government. Both of these constitutional provisions were adopted September 3, 1912.

⁵ 99 Ohio St. 220, 124 N.E. 134 (1919).

⁶ Art. XVIII, § 13, adopted September 3, 1912. Note also art. XIII, § 6, which provides that "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

THE ILLUSTRATIVE CASES

In the first two decisions which followed the *Zielonka* case, *The Globe Security & Loan Co. v. Carrel*,⁷ and *The Marion Foundry Co. v. Landes*,⁸ both of which also involved other similar causes, the supreme court recognized, but found no occasion to apply adversely, the pre-emption doctrine.

The *Globe Security* case involved the validity of a Cincinnati ordinance which levied an occupational tax upon the business of lending money on chattel mortgages or wage assignments. A state statute⁹ then in effect required persons engaged in such business to obtain a license from the commissioner of securities and to pay to the state an annual license fee, and provided that "no other and further license fee shall be required from any such licensee, by the state or any municipality." The court held that the state statute "while restricting the state and the municipalities of the state from exacting further license fees in the regulation of such business, in no way restricts the state or the municipalities from levying an excise tax upon the business of such licensee as a revenue measure."¹⁰ In its opinion the court observed that payment of the tax was not a prerequisite to the right to engage in the particular business, and found no conflict between the regulatory state statute and the municipal taxing ordinance.

The *Marion Foundry* case involved an occupational tax upon persons, firms and corporations carrying on a variety of specified trades, professions, occupations, businesses, and employments in the city of Marion. Actually, the case appears to have involved the power of a municipality to levy an occupational tax and the mechanics of such a levy rather than proscription under the pre-emption doctrine. In upholding the tax, the court referred extensively to the *Zielonka* case.¹¹

In *City of Cincinnati v. American Telephone & Telegraph Co.*,¹² which also involved two other utility cases, the supreme court for the first time invoked the doctrine of pre-emption by implication to

⁷ 106 Ohio St. 43, 138 N.E. 364 (1922).

⁸ 112 Ohio St. 166, 147 N.E. 302 (1925).

⁹ Ohio Gen. Code, §§ 6346-1, 6346-2.

¹⁰ Syllabus, par. 2, which cited with approval and followed the *Zielonka* case.

¹¹ In its opinion, at page 174, the court said: "The question here is one of power rather than of policy, and we are unable to make any distinction in principle between the levying of an excise tax against an osteopathic physician, as was done in the case of *State ex rel. Zielonka v. Carrel*, *supra*, and the levying of an excise tax against any other occupation or profession, whether such occupation or profession be designated by name or classified, or the tax be levied against occupation generally."

¹² 112 Ohio St. 493, 147 N.E. 806 (1925).

invalidate a municipal tax. In question was a Cincinnati ordinance which levied an excise tax upon many occupations including the occupation or business of operating a railroad, a telegraph company, and a telephone company. The tax was levied at annual flat rates upon the privilege of doing business within the city. Then existing state statutes levied excise taxes for the privilege of carrying on intra-state business, measured by gross receipts, upon telephone, express and telegraph, and railroad companies.¹³ Speaking conjecturally concerning the rationale of the *Zielonka* case, which will be hereinafter discussed, the court held that the power of a municipality to lay occupational taxes "does not extend to fields within such municipality which have already been occupied by the state."¹⁴ In so deciding, the court relied primarily upon the rule of stare decisis, citing not only the *Zielonka* case but the *Globe Security* and *Marion Foundry* cases as well.¹⁵ The court also expressed some doubt as to the constitutional powers of a municipality to levy an excise tax at all, but, referring to the *Zielonka* case, said it was "neither disposed to unsettle the law by overruling that case, nor to extend the power of municipalities in that respect by a further interpretation removing the limitation therein expressed." Thus, in spite of professed doubts, the court not only passed up an opportunity to repudiate the doctrine of pre-emption by implication but, as it has turned out, passed by the point of no return as well.

One month after the *American Telephone & Telegraph* case, the supreme court decided *Firestone v. City of Cambridge*.¹⁶ This case involved the levy of an annual fee by a municipal ordinance, upon motor vehicle owners residing in the municipality, for the privilege of operating such motor vehicles upon the streets thereof. The purpose of the levy was to provide funds to be used for the cleaning, maintenance, and repair of the streets of the municipality. At the time of the enactment of this ordinance there were in effect state statutes which levied an excise tax upon the owners of motor vehicles for the maintenance and repair of public roads, highways, and streets, and which also provided that fifty per cent of all such taxes should be returned to the municipality where they originated, to be used for the purpose of street repair.¹⁷ The court held the Cambridge levy to be an excise

¹³ Ohio Gen. Code, §§ 5483, 5485 and 5486.

¹⁴ Syllabus, par. 2.

¹⁵ In concluding its opinion the court said, at page 499: "To the end that the sovereignty of the state may be superior to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this court adheres to the interpretation of the power conferred by the Constitution upon municipalities to levy an excise tax announced in *State ex rel. Zielonka v. Carrel*, *supra*, with the limitation therein expressed."

¹⁶ 113 Ohio St. 57, 148 N.E. 470 (1925).

¹⁷ Ohio Gen. Code, §§ 6299 *et seq.*

tax, even though denominated a license fee, and hence that no municipality has power to levy such an excise tax in addition to that levied by the state for similar purposes. In so deciding, the court again resorted to *stare decisis*, citing the *Zielonka* and *American Telephone & Telegraph* decisions, although, as will be later shown, it had more definite ideas as to rationale.

The Cincinnati occupational tax ordinance was again before the court in two cases which were decided a month apart in 1931, with conflicting results, namely, *Stredelman v. City of Cincinnati* and *City of Cincinnati v. Cincinnati Oil Works Co.*¹⁸ In the *Stredelman* case, it was contended that the particular provisions of the ordinance levying an occupational tax upon persons engaged in the business of selling, soliciting or negotiating various forms of insurance were invalid because the plaintiff sold insurance as agent for certain foreign insurance companies, and brokered it as to other foreign companies, and because all such companies paid taxes levied by the state upon their privilege of doing business in Ohio. The plaintiff urged that the *American Telephone & Telegraph* decision was fully applicable and dispositive of the issues involved. The court held, however, that the field of taxation had not been pre-empted because the state had levied taxes upon the privilege accorded foreign insurance companies to do business in Ohio or because they had paid the state license fees on account of plaintiff's acting as their agent. In reaching this conclusion the court emphasized certain evidential findings below which warranted the conclusion "that plaintiff was engaged in a business of his own within the terms of the ordinance, and therefore that the assessment of the occupational tax upon his business does not result in an indirect tax upon foreign corporations doing business in Ohio."

The other 1931 decision, perhaps the most disturbing of the earlier decisions, is that of *Cincinnati Oil Works Co.*, also involving cases of two other oil companies. The plaintiffs in these cases owned and operated gasoline filling stations in the city of Cincinnati. The ordinance in question undertook to levy an excise or occupational tax of one hundred dollars per annum upon operators of such gasoline filling stations. After referring to most of the cases hereinbefore discussed, the court said that it had no hesitancy in concluding that the city tax was an excise or occupational tax, and that it was invalid and unenforceable because the state had theretofore imposed "upon the same parties, and others doing a like business in the city of Cincinnati, an excise or occupational tax which completely occupied and covered the field of taxation in which the city was attempting to

¹⁸ 123 Ohio St. 542, 176 N.E. 215 (1931) and 123 Ohio St. 448, 175 N.E. 699 (1931), respectively.

impose an additional excise or occupational tax upon the same citizens." Continuing, the court argued:

We are unable to appreciate any substantial merit in the claim made by the city that the tax imposed by the state upon gasoline sold to be used in propelling motor vehicles upon the highways of the state is not in fact an excise or occupational tax against the owners of filling stations selling the gasoline, but is in fact a tax that affects only the purchasers or consumers of such gasoline, for the reason that the purchasers and consumers pay the amount of the tax in the purchase price paid for gasoline, and that the owner of the filling station is simply the agent through whom the tax is ultimately paid to the state. The state gasoline tax is imposed by the state upon the business of the owner of the filling station, and not upon the consumer of the gasoline.

If there were any doubt after the *Oil Works* case that the doctrine of pre-emption extended beyond taxes of the same kind and included taxes of remote consanguinity, that doubt was dispelled in *Haefner v. City of Youngstown*,¹⁹ decided fifteen years later. The ordinance in question levied a tax of two and one-half per cent of the net rate charged by public utilities for natural gas, electricity and water and for local service and equipment furnished to telephone subscribers. The ordinance also provided in substance that the tax should be added to the consumer's bill for the specified utility service and the charges for both tax and service collected at the same time. The tax was held invalid under the pre-emption doctrine, the law of the case being expressed in paragraphs 3 and 4 of the syllabus as follows:

3. Municipalities have power to levy excise taxes to raise revenue for purely local purposes; but under Section 13, Article XVIII of the Constitution, such power may be limited by express statutory provisions or by implication flowing from state legislation which pre-empts the field by levying the same or a similar excise tax.

4. By virtue of Section 5546-2, General Code, which has levied a retail sales tax, and Section 5483, General Code, which (supplemented by House Bill 196, 120 Ohio Laws, 123) has provided for a tax on the gross receipts of utility companies, the state has pre-empted that field of taxation which includes, inter alia, receipts by utility companies from natural gas, electricity and water sold to consumers and local service and equipment furnished to telephone subscribers.

In simple terms, the facts were these. The city imposed an excise tax upon consumers of utility services based upon the rate charged. The state imposed a retail sales tax upon the same consumers, but *exempted* utility services.²⁰ The state also imposed a

¹⁹ 147 Ohio St. 58, 68 N.E.2d 64 (1946).

²⁰ Ohio Gen. Code, § 5546-2 levied an excise tax "on each retail sale made in this

privilege tax measured by gross receipts upon such utility companies.²¹ Nevertheless, the court held that the state tax legislation impliedly pre-empted the field. In the opinion, the court said that a reason for exempting sales by public utilities from the sales tax is found in the fact that their gross receipts were subject to the state excise tax; that this and other similar exemptions in the sales-tax law were in keeping with a legislative policy of exempting sales already taxed in the same or a similar way;²² and that "inferentially the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities."

While municipal income taxes in Ohio have found support for other reasons, it seems clear that the proscription of the excise tax fields by *Haefner* and the earlier cases was the basic inducement for their introduction into the local revenue system. Since the state had not entered the income tax field, it was thought that municipalities would have no difficulty in this area, and Toledo moved in first. Nevertheless, it took another supreme court decision to secure the right of that and other cities to enact such levies. The deciding case was *Angell v. City of Toledo*,²³ and it involved the question of constitutional, as distinguished from statutory, pre-emption by implication, concerning which the court had indulged in obiter dictum in the *Zielonka* case.

The Ohio Constitution contains specific provisions authorizing the state to levy an income tax and requiring that not less than fifty per centum of any such tax so levied by the state shall be returned to the city, village or township in which it originated.²⁴ Referring to these provisions, Judge Nichols had categorically declared the doctrine of constitutional pre-emption in the *Zielonka* case,²⁵ in these words:

It may be said in this connection that it is clearly to be implied from the constitution that municipalities are without power to levy an income or inheritance tax.

state of tangible personal property" with certain exceptions. Among the exceptions there were specified in sub-section (6) sales of gas by gas companies, sales of electricity by electric light companies, sales of water by waterworks companies, and all sales by any other public utility defined in § 5415 of the General Code. This section included, in addition to the above named utilities, telephone companies.

²¹ Ohio Gen. Code, § 5483, which imposed the gross receipts tax upon electric light, natural gas, waterworks, telephone and other specified utilities for the privilege of carrying on intrastate business.

²² For example, Ohio Gen. Code, § 5546-2(3), (4) and (5) exempted sales of motor vehicle fuel otherwise taxed under § 5527, sales of cigarettes otherwise taxed under § 5894-2, sales of beer otherwise taxed under §§ 6212-48 and 6212-49b, and sales of wine otherwise taxed under § 6064-41.

²³ Note 2, *supra*.

²⁴ Ohio Const., art. XII, §§ 8 and 9.

²⁵ Note 5, *supra*, at pages 228, 229.

This implication necessarily arises from the language of Section 9, Article XII, where we find the mandatory provision to the effect that "not less than fifty per centum of the income and inheritance taxes that may be collected by the state *shall* be returned to the city, village or township in which said income and inheritance tax originate."

It would seem quite certain, then, that the state alone can initiate taxation of this character.

However, in the *Angell* case, the supreme court expressed a unanimous certainty to the contrary when it held, as stated in the first two paragraphs of the syllabus, that:

1. Ohio municipalities have the power to levy and collect income taxes in the absence of the pre-emption by the general assembly of the field of income taxation and subject to the power of the general assembly to limit the power of municipalities to levy taxes under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution.

2. The state has not pre-empted the field of income taxation authorized by Sections 8 and 9 of Article XII of the constitution, and the general assembly has not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the constitution, passed any law limiting the power of municipal corporations to levy and collect income taxes.

In reaching its decision, the court found that the home-rule amendment²⁶ conferred sovereign powers of taxation upon municipalities subject only to the restrictive powers of the General Assembly,²⁷ thus resolving the lurking doubts expressed in the *American Telephone & Telegraph* and the *Haefner* cases, *supra*, hereinafter more fully discussed; and it declared that in the interpretation of the Ohio Constitution an income tax is not to be treated as an excise tax.

This last stated declaration has meaningful significance when considered in relation to the concurring opinion of Judge Taft. He did not concur in paragraph 2 of the syllabus, stating that it is "too broad unless 'the field of income taxation' referred to therein is limited to that covered by the income tax levied against appellant." The appellant had argued that the state has occupied part of the field of income taxation by enacting the utilities excise tax measured by gross receipts,²⁸ the corporation franchise tax which involves a receipts allocation factor,²⁹ and an intangibles tax measured by income yield.³⁰ Answering this argument, Judge Taft said:

²⁶ Note 4, *supra*.

²⁷ Note 6, *supra*.

²⁸ Ohio Gen. Code, §§ 5483 to 5487, inclusive.

²⁹ Ohio Gen. Code, §§ 5495 to 5499, inclusive.

³⁰ Ohio Gen. Code, §§ 5638 and 5638-1.

The doctrine of pre-emption of a field of taxation by the state, as preventing occupation of such field by a municipality, is based on the apparent intention of the general assembly to be inferred from its occupation of the particular field of taxation. When the general assembly does occupy a particular field of taxation, it may reasonably be inferred that it intends to exclude municipalities from such field. It has authority to do this under Section 13 of Article XVIII and Section 6 of Article XIII of the constitution. However, the occupation by the state of a small portion of a particular field of taxation does not necessarily indicate the intention of the general assembly to exclude municipalities from the portion of such field not so occupied.

At this time, the court does not have before it the question as to whether, by enactment of the state excise tax, the state franchise tax or the intangible tax, the state has pre-empted a portion of the field of income taxation. . . .

The court had one facet of this question before it just five years later in another Toledo case, *Ohio Finance Co. v. City of Toledo*,³¹ in which the question was presented whether the city could impose its income tax on such portion of the net profits of a dealer in intangibles, in this case a small loan company, as are derived from the income yield of interest-bearing promissory notes. The decision of the court was succinctly stated in the syllabus as follows:

In view of the provisions of the state tax laws, providing generally for a tax against the owner of five percent on the income yield from his intangibles but then providing for taxation of the shares of a dealer in intangibles at five mills of their fair value and further providing that such latter tax should be in lieu of all other taxes on property such as intangibles owned by such a dealer, a municipality may not impose an income tax on such portion of the net profits of such a dealer as are derived from the income yield of intangibles owned by such dealer.

Upon analysis of the state taxing statutes, a majority of the court concluded, in an opinion written by Judge Taft, that the General Assembly had clearly expressed an intent that no municipal tax shall be imposed on income which a dealer in intangibles receives from intangible property owned by him, even though the state intangibles tax is a property tax measured by income yield and is not an income tax as such. "Such an expressed legislative intention," the majority reasoned, "should be just as effective a limitation on the power of a municipality to tax that subject (i.e., income received from intangibles owned) as the limitation which would be implied from the exaction by the state of a tax on that subject."³²

³¹ 163 Ohio St. 81, 125 N.E.2d 731 (1955).

³² Ohio Rev. Code § 718.01 constituting part of the Uniform Municipal Income Tax Act, provides: "Nothing in this act shall be construed to authorize the levy of any

A minority of the court thought that the majority opinion placed too strict a limitation upon the taxing powers of a municipality. In the dissenting opinion written by Judge Zimmerman, the minority agreed that while the income of the ordinary taxpayer derived from investments cannot be reached by a municipal income tax, ("the tax is actually against income, no matter what nomenclature such tax may be given"³³), nevertheless, the state tax upon dealers in intangibles is actually an ad valorem property tax and not an income tax. Thus, the minority concluded "that in order to say that the state has pre-empted a field of taxation to the exclusion of a municipality the situation should be confined to those instances where both the state and the municipality have imposed the same or a similar tax on the same taxpayer."

This more liberal view of the minority in the *Ohio Finance Co.* case became the prevailing view in *Benua v. City of Columbus*,³⁴ the most recent case in the current series. Here it was contended that the city income tax ordinance was unconstitutional as applied to rents from real property, upon the ground that a tax upon such income is in fact a tax on the property itself. The court decided this issue against the taxpayer, holding in paragraphs 3 and 4 of the syllabus as follows:

3. A municipal income tax does not become a tax on real property by reason of the fact that the income on which the tax is levied consists of rentals from such real property.

4. Where a municipal income tax is levied on rentals from real property, the tax is not levied on the property from which the income is derived, there is no invasion of an area of taxation occupied by the state, and the doctrine of pre-emption is without application.

In support of its position in this case, the plaintiff had relied upon *Bennett v. Evatt*,³⁵ in which Judge Matthias had said, in reference to the Ohio tax upon productive investments, that "a tax based on the income yield of intangible property" is not an income tax but a property tax. From this the argumentative inference was urged that a tax

tax on income which a municipal corporation is not authorized to levy under existing laws." It has been the opinion of the writer hereof that this provision was designed to preserve within the municipal income tax field the vitality of the *Ohio Finance Company* decision and any subsequent decisions of similar character. See Glander, "The Uniform Municipal Income Tax Act," 18 Ohio St. L.J. 494.

³³ But cf. *Bennett v. Evatt*, 145 Ohio St. 587, 62 N.E.2d 345. At page 593, Judge Matthias stated: "Concededly a tax based on the income yield of intangible property is not an income tax, an excise tax or a franchise tax. It necessarily is a tax upon property. . . ."

³⁴ 170 Ohio St. 64, 162 N.E.2d 467 (1959).

³⁵ Note 33, *supra*.

upon the income yield of real estate, namely rentals, was in fact a tax upon the property and, since the state was already in the property tax field, the municipality was precluded. However, the court, speaking through Judge Peck, its newest member and a former Tax Commissioner of the state, held that "a tax levied on account of the ownership of intangible property does not become an income tax simply because the amount of the tax is determined from or 'based on the income yield' of the intangible property" and that its analysis in this regard was "no more than a reaffirmation of the point made by Judge Matthias" in the *Bennett* case. Then, after citing case distinctions³⁶ between property taxes and income taxes, Judge Peck answered the plaintiff's argument in these words:

In the light of the foregoing, the distinction between the Columbus city income tax and any property tax readily becomes apparent. The Columbus city income tax is a tax upon net profits earned, and, as stated above, a property tax is a tax on account of ownership and in the case of one type of personal property its productive capacity is used as a means of arriving at the amount of the tax to be assessed. In this process the tax is not shifted from the property to the income and in the case of the Columbus city income tax the levy is not shifted from the income to the property simply because the former happens to be derived from the latter.

Thus, the court, six judges concurring, concluded that "the Columbus city income tax is a tax on income and not on property and does not intrude into a pre-empted field of property taxation." It is interesting to note that Judge Taft alone dissented, without opinion. One can only speculate that he sensed some basic conflict between Judge Peck's delineation of proscribed fields of municipal taxation and his own delineation thereof in the *Ohio Finance Co.* case.

There may well exist such a conflict and it might have been brought to light had the plaintiff advanced one additional argument which, so far as the opinions in the *Benua* case indicate, apparently was not made. The state intangible tax law applies to "contractual obligations for the periodical payment of money and other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, excepting (1) interests in land and rents and royalties derived therefrom . . ."³⁷ *Quaere*, paraphrasing Judge Taft's language in the *Ohio Finance Co.* case, has the General Assembly thus clearly expressed an intent that no tax shall be imposed on the income

³⁶ Including *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937), in which Mr. Justice Stone emphasized that the "incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income."

³⁷ Ohio Rev. Code, § 5701.06(c).

which a person receives from real estate that he owns, especially since that real estate is otherwise taxed by the state? Or, as suggested (but not actually decided) in the *Haefner* case,³⁸ is the mere declaration of exemption from a state tax as much a limitation on municipal taxing power as the imposition of a tax by the state?

Whatever may be the ultimate answers to these somewhat esoteric inquiries, it seems clear that, for the present at least, the court eschews the "too strict" limitation upon the taxing powers of a municipality and stands upon the simply stated proposition that state pre-emption of a tax field by implication occurs only when the state has levied "the same or a similar tax," as expressed by Judge Zimmerman in his *Ohio Finance Co.* dissent and as ruled in the *Haefner* case. But what is meant by a "similar" tax? This is an elastic if not ambiguous term which easily lends itself to both strict and liberal interpretations of the preemption doctrine, as the cases have amply illustrated.

RATIONALE OF THE DECISIONS

It is one thing to understand what the judicial doctrine of pre-emption by implication as illustrated by the cases actually is; it is quite another thing to understand why it exists at all. Since municipalities have full powers of local taxation under the home-rule amendment, subject only to the power of the General Assembly to pass laws of a limiting or restrictive character, the question repeatedly arises why the supreme court has felt called upon throughout the years to sanction the doctrine of implied as well as express interdiction.

Perhaps the best approach to this inquiry is to point out that the court, despite the confident assurance of Judge Nichols in *Zielonka v. Carrel*, *supra*, has not always been sure that the grant of all powers of local self-government to municipalities under the home-rule amendment actually carried with it the power of taxation. This lurking doubt was succinctly expressed by Judge Robinson in *City of Cincinnati v. American Telephone & Telegraph Co.*,³⁹ the first case in which the pre-emption doctrine was invoked to actually invalidate a tax, in which he said:

It is sufficient to say that the decision in the *Carrel* case, *supra*, declaring the right of the municipality to levy an excise tax at all, was arrived at by an interpretation of the constitution rather than by apt words therein found, and was then and since has been a subject of some doubt.

Again, in *Haefner v. City of Youngstown*,⁴⁰ Judge Williams reiterated

³⁸ Note 19, *supra*.

³⁹ Note 12, *supra*.

⁴⁰ Note 19, *supra*.

the same doubt and, after alluding to taxation as an attribute and function of sovereignty, said:

The power to tax has not been expressly conferred upon municipalities and, were there no binding precedents, the question as to the existence of any such power would present some difficulty, as was pointed out by Judge Robinson in *City of Cincinnati v. American Telephone & Telegraph Co.*, 112 Ohio St. 493, 147 N.E. 806.

In both of these cases, however, the court bowed to precedent, pointing out that the doubt had been resolved in favor of the municipal taxing power and that this must be regarded as the settled law of the state. By the time the case of *Angell v. City of Toledo*⁴¹ was decided, judicial confidence on the point had been fully restored as indicated by these words of Judge Turner:

In the home-rule amendment to the Ohio Constitution (Article XVIII) the sovereignty of the state was so limited as to confer certain sovereignty upon municipalities, viz.; Sections 3 and 7 of Article XVIII.

. . . .

A fundamental power of government is the power to raise revenue.

. . . .

Nevertheless, this was thirty years after Judge Nichol's first confident expression on the point, and the doubts that apparently arose from time to time during the intervening period with reference to the basic taxing powers of municipalities may well have had some bearing upon the court's general adherence to the doctrine of implied limitation.

There are, of course, evidences of more tangible and fundamental motivations underlying the court's decisions. Although the doctrine of pre-emption by implication was merely stated without clearly expressed reasons in the *Zielonka* case,⁴² and but cryptically reiterated in the *Globe Security & Loan Co.* and *Marian Foundry Co.* cases,⁴³ it was given both conjectural and concrete rationalization in the *American Telephone & Telegraph Co.* case.⁴⁴ In this case, referring to the *Zielonka* case, the court suggested that it rested on one of three possible bases, saying:

Whether the court reached the decision that the levying of an excise tax upon an occupation by the state operated as a limitation upon the right of the municipality to levy an excise tax on the same subject, (1) by analogy to the rule declared by the United States Supreme Court upon the interstate commerce clause of the federal constitution, to the effect that, with reference to the sub-

⁴¹ Note 23, *supra*.

⁴² Note 5, *supra*.

⁴³ Notes 7 and 8, *supra*.

⁴⁴ Note 12, *supra*.

jects that are intrastate as well as interstate, a state may enact laws only so long as Congress fails to act, but that when Congress has legislated upon the subject the sovereignty of the state is superseded by the superior sovereignty of the United States, or (2) whether the decision was arrived at upon the theory that the limitations exist because of the fact that Section 3, Article XVIII, grants to municipalities only such "powers of local self-government . . . as are not in conflict with general laws," and that when the state has enacted general laws, such as Sections 5483, 5485, and 5486, General Code, an ordinance attempting to tax an occupation for the privilege of doing a thing for which the state has already taxed it is for that reason in conflict with general laws, or (3) whether the court reached the conclusion that the enactment of Sections 5483, 5485, and 5486, General Code, operates as a restriction on the power of taxation by the municipality, under the provisions of Section 6, Article XIII, of the constitution, the opinion does not disclose.

It is interesting to note that the court did not undertake in this or other cases⁴⁵ to justify the pre-emption doctrine precisely upon the speculative reasons as above stated but instead formulated its own philosophy in terms of the relationship which exists, or which is thought should exist, between the state and its political subdivisions. In this case, Judge Robinson tied the pre-emption doctrine to the concept of state sovereignty, saying at the conclusion of the opinion:

That the levying of a tax is an exercise of sovereign power, that the sovereignty of the state extends to each of its four corners, within the municipalities as well as without, is not a subject of debate; that such sovereignty would be impaired by construing the constitution so as to give a subdivision of the state equal sovereignty in so important a subject as that of taxation cannot be gainsaid.

To the end that the sovereignty of the state may be superior to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this court adheres to the interpretation of the power conferred by the constitution upon municipalities to levy an excise tax announced in *State ex rel. Zielonka v. Carrel*, *supra*, with the limitations therein expressed.

These are persuasive words, but one well may ask whether, logically, they do not beg the question. Was not the sovereignty of the state limited by the constitutional home-rule amendment "so as to confer certain sovereignty upon municipalities," as suggested by Judge Turner in the *Angell* case, *supra*? Whether it was so limited or not, is not state sovereignty completely safeguarded by article XVIII, section

⁴⁵ A possible exception is the *Globe Security* case, *supra*, in which the conflict theory was suggested. The court said: "We find no conflict between the provisions of § 6346-1 *et seq.* and the ordinance of the city of Cincinnati as disclosed by the record."

13, which provides that laws may be passed by the General Assembly to limit the power of municipalities to levy taxes? In other words, since the state may preserve its sovereign position at any time and under any circumstances simply by enacting a prohibitive statute, is there any logical necessity for resorting to the doctrine of pre-emption by implication for which the constitution itself makes no express provision?

A more cogent justification for adherence to the pre-emption doctrine is found in the tax sharing device and legislative intent that is deducible therefrom. This was first suggested in *Firestone v. City of Cambridge*,⁴⁶ in which the court held that a city fee imposed upon motor vehicle owners for the privilege of using the streets was invalid because the state had pre-empted the field by levying an excise upon such motor vehicle owners for the same and similar purposes. In reaching its decision, the court, after noting that under the state taxing statute fifty per cent of the taxes collected were required to be returned to the municipality where they originated, to be used for street purposes, and that the city received about \$11,000 from that source each year, concluded with these words:

It is to be observed that the legislature not only levied this tax for the benefit of the state, but for the benefit of municipalities as well. No municipality has power to levy such a tax in addition to that levied by the state for similar purposes.

While the court did not express itself directly, it seemed to suggest that the General Assembly intended that the state tax should serve both state and local purposes, and hence that the city levy was proscribed as clearly as though a specific restrictive statute had been enacted.

In *Haefner v. City of Youngstown*,⁴⁷ the court again buttressed its decision with an inference of legislative intent based upon tax sharing, but with a somewhat different emphasis. Here, it will be remembered, the city tax upon consumers of utility services measured by the periodic amounts charged therefor was invalidated because the state had levied a sales tax from which utility sales were exempted for the reason that the gross receipts of utility companies were subject to another state-levied gross receipts tax. After pointing out that both the sales tax and the gross receipts are shared taxes in that the statutes provided for the distribution of a portion of the revenue derived therefrom to the municipalities,⁴⁸ the court then said:

Inferentially the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper

⁴⁶ Note 16, *supra*.

⁴⁷ Note 19, *supra*.

⁴⁸ Ohio Gen. Code, §§ 5546-18, 5546-19, 5491.

or are the "gross receipts" of utilities that are subject to the excise tax under Section 5483.

Here we should pause to inquire whether the court did not in fact weaken its position. Legislative intent to prohibit a particular municipal tax, inferable from a state-levied, locally-shared tax of the same kind, may have a logical appeal standing alone, but to couple it with the concept of double taxation seems only to confuse the issue. Double taxation is primarily a policy consideration, not a legal consideration,⁴⁹ and it is in the former sense that it must be assumed the court spoke in the *Haefner* case. This being true, it would seem that intent to avoid double taxation would be a less relevant consideration than intent to proscribe a particular municipal tax within the context of the pre-emption doctrine.

The court itself has apparently reached the same conclusion for it has not since talked about legislative intent to avoid double taxation, but rather about legislative intent to interdict. This is illustrated by the comment of Judge Taft in his concurring opinion in the *Angell* case⁵⁰ when he said, "The doctrine of pre-emption of a field of taxation by the state, as preventing occupation of such field by a municipality, is based on the apparent intention of the General Assembly to be inferred from its occupation of the particular field of taxation." This reasoning, it will be noted, is barren of any reference to tax sharing, as also is his further statement that "when the General Assembly does occupy a particular field of taxation, it may reasonably be inferred that it intends to exclude municipalities from such field."

These identical statements were repeated by Judge Taft in his majority opinion in the *Ohio Finance Co.* case,⁵¹ and the concept was in no way modified by the court's latest pronouncement in the *Benuea* case.⁵² Thus any critique of the pre-emption doctrine comes down at last to this: When the General Assembly levies a particular tax, is it reasonably to be inferred from that fact alone that the General Assembly intended to prohibit municipalities from levying the same or a similar tax? Answering this question, as it must be answered, apart from stare decisis, and apart also from all considerations of tax policy, it is the writer's opinion that logic does not support any such inference.

Of course, where the general assembly levies a tax and provides that the revenue to be derived therefrom shall be shared with the municipalities, a much stronger case for pre-emption may be made be-

⁴⁹ See Glander and Dewey, "Municipal Taxation: A Study of the Pre-emption Doctrine," 9 Ohio St. L.J. 72 (1948) at pages 90-91 and cases therein cited and discussed.

⁵⁰ Note 23, *supra*.

⁵¹ Note 31, *supra*.

⁵² Note 34, *supra*.

cause legislative intent to monopolize the field seems more logically inferable from the mandatory tax-sharing requirements than merely from state entry into the field. It was at least partially in this context, let it be remembered, that the doctrine of pre-emption by implication was conceived. For when, in the landmark case of *Zielonka*, Judge Nichols uttered his now famous dictum that municipalities have no power to levy an income or inheritance tax, he said that this implication necessarily arises from the mandatory provisions of the constitution to the effect that "not less than fifty per centum of the income and inheritance taxes that may be collected by the state *shall* be returned to the city, village or township in which said income and inheritance tax originate." While in over-all effect the decision itself appears to sanction pre-emption by implication where the state merely invades the field "on its own account,"⁵³ the court had no occasion to expound the doctrine beyond its inchoate stage, but rather left "the interesting question whether both the state and municipality may occupy the same field of taxation at the same time" for the courts to decide some day.

In suggesting that logic does not support the proposition that occupancy of a tax field by the state justifies a reasonable inference that the general assembly intended to exclude municipalities from that field, the writer bases his opinion upon five propositions which, for the sake of brevity, are stated without amplification.⁵⁴

First. Municipal taxing power in Ohio is derived, not from the General Assembly, but from the Ohio Constitution. As stated in the *Angell* case, *supra*,: "In the home-rule amendment to the Ohio Constitution (Article XVIII) the sovereignty of the state was so limited as to confer certain sovereignty upon municipalities, *viz.*, Sections 3 and 7 of Article XVIII." Moreover, the "certain sovereignty" so conferred upon municipalities includes the power of taxation. As stated in the *Zielonka* case, *supra*,: "There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation, for without this power local government in cities could not exist for a day."⁵⁵

Second. There is no provision in the Ohio Constitution (or in any higher body of fundamental law) and no decision by the Supreme Court of Ohio save one which, apart from the restrictive powers granted

⁵³ See also par. 2 of the syllabus, *supra*.

⁵⁴ If it be considered that any of the five propositions is, in any particular, inconsistent with the analysis appearing in 9 Ohio St. L.J. (1948), it may be understood that the conflicting view herein expressed is a modification of this writer's earlier view.

⁵⁵ In the *Angell* case, the court echoed this same concept. In discussing the home-rule amendment and after quoting the provisions thereof, the court said: "A fundamental power of government is the power to raise revenue."

to the General Assembly by article XVIII, section 13, and article XIII, section 6, of the Ohio Constitution, would prevent both the state and the municipalities from occupying the same field of taxation at the same time. Except for the *American Telephone & Telegraph* case, *supra*, in which the court would not "give a subdivision of the state equal sovereignty in so important a subject as that of taxation," the sole legal basis for the pre-emption doctrine is that of express interdiction or proscription by implication of legislative intent arising under the aforesaid sections of articles XVIII and XIII of the Ohio Constitution.⁵⁶

Third. The doctrine of pre-emption by implication of legislative intent, as distinguished from express interdiction, is not necessary to preserve the sovereignty of the state government over its municipalities "in so important a subject as that of taxation." Such state sovereignty is fully safeguarded by the provisions of article XVIII, section 13, of the Ohio Constitution which was adopted at the same time the home-rule amendment was adopted,⁵⁷ and which grants to the General Assembly the authority at any time and under any circumstance to pass laws to limit the power of municipalities to levy taxes and incur debts for local purposes.

Fourth. There is no express provision of the Ohio Constitution to the effect that the enactment of a particular tax by the general assembly shall be deemed to constitute, by any kind of inference, a limitation upon the power of municipalities to levy the same or a similar tax. Moreover, the words used in article XVIII, section 13, to-wit: "Laws may be passed to limit the power of municipalities to levy taxes . . .," when interpreted in relation to the purpose and scope of the home-rule amendment itself, would seem to imply and require an overt act of restriction by the General Assembly, and the absence of such an overt act of express interdiction would seem to constitute an acquiescence by the General Assembly in the exercise of the municipal taxing power. This is to say, given the sovereign power to levy a tax for municipal purposes, the exercise of such power by a municipality should be regarded as valid by the state, even though it is also in the field, when the state has not bothered to pass a law expressly limiting such exercise of the municipal taxing power.

⁵⁶ Language found in par. 3 of the syllabus of *State ex rel. v. Cooper*, 97 Ohio St. 86, 119 N.E. 253 (1917), when considered apart from the context of the case, might also be regarded at first blush as authority for the proposition that municipalities cannot occupy the same tax field as the state. However, as pointed out in 9 Ohio St. L.J. 72, 92 (1948), analysis shows that the syllabus statement means nothing more than that municipal taxing powers under the home-rule amendment "are subject to the steadying hand of the General Assembly."

⁵⁷ September 3, 1912.

Fifth. It is theoretically possible that the doctrine of pre-emption by implication could be invoked to utterly stifle municipal governments and render them completely subservient to the state, notwithstanding the desire for limited autonomy which the people have expressed in the home-rule amendment. The question well may be posed as to what would happen in terms of public service and fiscal solvency in the fifty-one municipalities which now have city income taxes if the general assembly were to enact a state income tax. Absent a provision for permissive local levies, hereinafter discussed, the state income tax enactment would automatically invalidate the fifty-one local levies over night, and chaos clearly could result. It is not enough to say that this would not happen or, indeed, that it would not be permitted to happen. The fact that it theoretically could happen, in spite of the home-rule intentions of the people of Ohio as expressed in the constitutional amendment which they adopted, is sufficient to demonstrate the logical weakness, and hence the legal invalidity, of the judicial doctrine of pre-emption by implication.

THE ASPECT OF PUBLIC POLICY

To conclude that the doctrine of pre-emption by implication is legally unsound is not to argue that the supreme court should abandon it now. Even though it does not withstand the tests of logic, it has been a part of our decisional law too long to be cast aside with impunity. There is, first of all, something to be said for *stare decisis*, even in these days when judicial experimentation is sometimes considered more respectable than historical precedent. It was recently most eloquently said by Judge Peck in another connection when, in respect of a decision which had been in being for but a year, he said: ". . . to so promptly disavow a conclusion thoughtfully arrived at by this court would for all time to come cause its decisions to be suspect as fragile, ephemeral things. . . . This need for stability of principle has occasioned the doctrine of *stare decisis* and causes it to be compelling among those who would despair at seeing the judiciary become subservient to whim."⁵⁸

Secondly, and of equal importance, it should be remembered that cold logic sometimes is outweighed by other values in the minds of men. In our present context, for example, double taxation, by which is meant the levy of the same tax by more than one unit of government having jurisdiction over the taxpayer, may not be illegal or unconstitutional, but it may be both unsound and unwise as a matter of public policy. In respect of the taxing powers of the states under the commerce clause of the federal constitution, the avoidance

⁵⁸ *State ex rel. Allison v. Jones*, 170 Ohio St. 323, 164 N.E.2d 417 (1960).

of multiple taxation has been a matter of real and substantial judicial concern.⁵⁹ Moreover, among the tax theoreticians there has always been a school of thought which supports the principle of separation of sources of revenue as between the state and local governments, notwithstanding the fact that the impracticability of completely separating sources of revenue has been clearly demonstrated by experience.⁶⁰ It therefore is not surprising to discover the Supreme Court of Ohio evidencing the same concern, whether voicing it or not, by construing the Ohio Constitution so as to avoid multiple taxation.

Even if it be argued that this is not sound adjudication in terms either of tax law or of tax policy, it may also be argued that irreparable harm is not the inevitable result. Even though, as has been observed, the doctrine of pre-emption by implication could work havoc overnight, as for example if the General Assembly should enact a state income tax without reference to municipal income levies, the people acting through their senators and representatives in the General Assembly have the means at hand to permit municipalities to occupy the same tax field as that occupied by the state. Such means consist of *permissive legislation*, which could be provided by inserting in any chosen state taxing statute a simple provision to the effect that nothing contained therein shall be construed as expressing or imposing a limitation on the power of a municipality to levy, assess or collect the same or a similar tax. The validity of such legislation would seem to be justified upon the ground that, since pre-emption by implication is based upon legislative intent, a simple declaration of negative intent would serve to nullify the doctrine in the particular situation.⁶¹

Legislation of this nature has been proposed. The first such proposal was introduced in the 97th General Assembly after the

⁵⁹ E.g., *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), in which Mr. Justice Stone first expounded and applied the "cumulative burdens" test as an "added reason" for sustaining a New Mexico tax on the business of publishing a magazine having an interstate circulation, measured by its gross receipts from advertising. Here the court found that "the tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." The "cumulative burdens" test, or "multiple taxation" doctrine, as it is sometimes described, had its heyday during the period from 1938 to about 1946.

⁶⁰ For an analysis of this approach to governmental financing both in Ohio and elsewhere, and for an evaluation of alternative methods of financing local governments, including separation of tax sources, see "A Study of the Tax and Revenue System of the State of Ohio and its Political Subdivisions": Report of the Tax Commissioner to the Governor and the 97th General Assembly, 1947, Chapter VI, pages 77-80.

⁶¹ For a detailed discussion of permissive legislation in this area, its methodology and legality, see Glander and Dewey, "Municipal Taxation: A Study of the Pre-emption Doctrine," 9 Ohio St. L.J. 72, 81-90 (1948).

decision in the *Haefner* case, but it did not pass.⁶² The identical proposal was last presented in the 103rd General Assembly,⁶³ and did not pass. Indeed, during the past fifteen years, this very proposal has been repeatedly introduced, but without any results whatever.⁶⁴

In addition to the foregoing technique, the 102nd General Assembly witnessed still another and broader approach. It was by means of general legislation negating any pre-emption by implication resulting from a state-levied tax in the absence of express statutory provision therefor.⁶⁵ This, too, got nowhere.

These abortive legislative attempts to nullify the doctrine of pre-emption by implication should be somewhat sobering to the devotees of supreme *laissez faire* in the field of municipal taxation. That the people, speaking through their chosen representatives, are satisfied with the public or tax policy aspects of the pre-emption doctrine now seems abundantly clear.

But, more important still, if the doctrine of pre-emption by implication is, in the final analysis, rooted in *legislative intent* to pre-empt a tax field for the state, as the later decisions imply, does not the repeated refusal of the General Assembly to negative such intent, as it might have done by permissive legislation, lend some little support to the notion that, as a matter of law from the case of *Zielonka* to this very moment, the supreme court has read the legislative mind aright?

⁶² S.B. 229, H.B. 14, 140, 97th General Assembly of Ohio.

⁶³ H.B. No. 65, which sought to amend § 5727.38 of the Revised Code, relating to public utility gross receipts taxes, and § 5739.02 of the Revised Code, relating to the sales tax, by adding this language: "Nothing contained in this section shall be construed as expressing or imposing a limitation on the power of a municipality to assess, levy or collect a consumer's utility tax."

⁶⁴ E.g., S.B. 229 and H.B. 14, 140, 97th General Assembly; H.B. 180, 181, 182, 98th General Assembly; H.B. 517, 101st General Assembly; H.B. 675, 102nd General Assembly; H.B. 65, 103rd General Assembly; and there may have been others.

⁶⁵ H.B. No. 964, which sought to enact § 1.25 of the Revised Code so as to provide that: "The levy, by the state, of a tax shall not be deemed to pre-empt the field of taxation in which said tax is levied, to the exclusion of a municipal tax in such field, unless the legislation imposing the state tax specifically provides that such tax shall pre-empt the field in which said tax is levied to the exclusion of municipal taxes in said field."